

HARLAND BROTHERS (PVT) LIMITED  
and  
RAYMOND FINAUGHTY  
versus  
THE MINISTER OF LANDS AND  
RURAL RESETTLEMENT  
and  
MRS WINNIE MUSHIPE

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 31 December, 2009 and 4 January, 2010

### **URGENT CHAMBER APPLICATION**

Mr. *D. Drury*, for the applicants  
Ms *S. Kundayi*, for first respondent  
Mr. *G. Mlothswa*, for second respondent

MUSAKWA J: This is an application for a spoliation order and an interdict in which second applicant claims that he and his family was summarily evicted from the remainder of Manda Estate A by a mob that was acting at the behest of second respondent. Subsequent to hearing the application I granted the application for spoliation only and indicated that my reasons would be furnished later. These are they.

The gist of the facts are that the second respondent was allocated the remainder of Manda Estate A measuring about 724 ha. The first applicant used to own Manda Estate in the district of Makoni measuring 2 999,9 ha. After the land was acquired by the government for resettlement purposes applicants remained in occupation of the remainder of Manda Estate A. The applicants are facing prosecution under the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. At the close of the state case applicants applied for discharge and a ruling is expected to be handed down on 15 January 2010.

In a founding affidavit deposed to by second applicant it is claimed that he and his family were in possession of the residence at the farm when on 24 December 2009 a mob descended upon them and ordered them to vacate. They were threatened with assault and other action if

they did not comply. There is considerable property on the farm including livestock. Applicants entered into contract farming with some resettled farmers. They have also been denied access to that land despite that it does not constitute part of the land that was allocated to second respondent.

The precursor to the events of 24 December was a visit to the farm on 19 December. Three persons introduced themselves as representatives of second respondent. One of them who introduced himself as Malisa or Mliswa claimed that they had instructions to take over the farm immediately. It was also stated that the beneficiary was tired of waiting for applicants' eviction and was also not interested in the outcome of the pending criminal proceedings. The second applicant contacted Police in order for them to intervene. A mob then sporadically laid siege on the farm. They are alleged to have been using a Mazda T35 truck and two tractors belonging to the second respondent. Farm workers were threatened in the process.

On 20 December Police visited the farm and managed to calm the situation. However, after Police officers left the mob resumed their hostile conduct. On the following day the second applicant visited Rusape Police Station. After some discussions with Police officers he was told that they would not involve themselves as this was a political matter. Matters finally came to a head on 24 December when second applicant and his family were forced to move out of the premises.

Mr *Drury* for the applicants submitted that there is a prescribed procedure by which an occupier of land is to be evicted. He pointed out to provisions of the Gazetted Land (Consequential Provisions) Act. He thus submitted that what has happened is that whilst that process is in motion it has been pre-empted by the unlawful eviction. He further submitted that there has been self-help as applicants' equipment has been seized in the process.

Mr *Drury* also submitted that for a spoliation order to be granted one only has to make a prima facie case. He cited Amler's Precedents of Pleadings third edition. He stressed that the Gazetted Land (Consequential Provisions) Act did not oust the law on spoliation in as far as the requirement for due process is concerned. Accordingly vacant possession can only be acquired

through a prescribed process. Consequently the legality of applicants' occupation of the land is irrelevant.

In respect of the order for an interdict Mr *Drury* submitted that all requirements for such relief have been met. He further submitted that the facts in the present matter are distinguishable from the case of *Airfield Investments (Private) Limited v The Minister of Lands, Agriculture and Rural Resettlement and Others SC 36/04*. This is because there is no law that prohibits contract farming, so Mr *Drury* argued.

The first respondent did not make any submissions on the merits of the application. Ms *Kundayi* who appeared for the first respondent indicated that they would abide by the decision of the court.

As for the second respondent Mr *Mlotshwa* submitted that his client denies any involvement in the conduct complained of. He thus submitted that the application is directed at the wrong respondent. This is because in second applicant's founding affidavit the leaders of the despoilers are named as Maliswa/Mliswa and Vashco. There is also reference to Minister Mutasa. He therefore argued that these persons should have been cited in the papers as the respondents.

Mr *Mlotshwa* further submitted that the applicants are required to prove two elements-

- (a) Quiet and undisturbed possession, and
- (b) Unlawful dispossession or absence of consent to the dispossession.

It was his submission that the burden of proof required is that of a balance of probabilities as in ordinary civil matters. In the first place applicants have to prove that second respondent despoiled them. Since this is disputed by second respondent a dispute of fact has arisen and cannot be resolved on the papers.

Mr *Mlotshwa* next argued that applicants have raised some allegations that are not substantiated. Some of the allegations raised by second respondent are not corroborated by Mr Harland or the farm manager or farm employees. In light of the denial by second respondent a dispute of facts has arisen that cannot be resolved on the papers.

The next argument raised by Mr *Mlotshwa* was that an order for spoliation cannot be granted on a prima facie basis. There must be proof on a balance of probabilities. According to him applicants have not discharged such onus and the matter should be referred to trial. He referred to the case of *Blue Rangers Estates (Private) Limited v Jamaya Muduviri and The Minister of Lands and Rural Resettlement* SC 29/09.

Mr *Mlotshwa* also attacked the relief being sought by way of interdict. He submitted that the land concerned is gazette land. By virtue of that fact it is inappropriate to seek an interdict as applicants no longer have any rights to the land following its acquisition by the State. This is particularly so taking into account the expiration of the notice given to applicants to vacate the land in terms of section 3 (2) (i) of the Gazetted Land (Consequential Provisions) Act. Thus applicants are in occupation of the land in defiance of the law as they have no lawful authority in terms of the Act.

In an application for a spoliation order an applicant has to establish the following requirements-

- (a) That he or she was in peaceful and undisturbed possession of the property, and
- (b) That he or she was forcibly or wrongfully deprived of such possession without their consent.

In this respect see the cases of *Diana Farm (Pvt) Ltd. v Madondo & Another* supra and *Botha & Another v Barrett* 1996 (2) ZLR 73 (SC).

In Amler's Precedents of Pleadings it is stated that a spoliation order is final and is rarely claimed by way of action by virtue of urgency that usually accompanies it. The *causa* of applicant's possession is immaterial and it is also irrelevant that the defendant has a stronger right of possession. This is because it is actual possession and not the right to possession that is protected. The same authors go on to state that because the merits of plaintiff's possession and defendant's right to possession are not justiciable in such proceedings there are no real defences which do not amount to a denial of the plaintiff's allegations.

The applicants allege the occupiers of the farm houses claim doing so on behalf of second respondent. The second respondent denies any involvement in the conduct complained of. It is

also claimed by applicants that second respondent's truck and tractors have been used in perpetrating acts of spoliation. In addition, some equipment is said to have been removed from applicants' butchery in Rusape and taken back to the remainder of Manda Estate A. The equipment is described as consisting of a tractor and a container with workshop equipment. There has been no specific denial of the allegations by second respondent, of the use of her vehicles in the conduct complained of. It is not denied that second respondent and his family has been forcibly evicted from the farm. On the facts before me it cannot be said that no spoliation has taken place and that second respondent is not involved.

Section 3 of the Gazetted Land (Consequential Provisions) Act criminalizes the occupation of Gazetted land without lawful authority. This includes the occupation of such land by former owners or occupiers. In terms of subsection (5) a court convicting a person for contravening the Act shall issue an order for that person's eviction from the land. That is the only provision dealing with the eviction of an occupier of gazette land. That is what constitutes due process. What it means is that no one can take it upon themselves to summarily evict any occupier of Gazetted land. In the present matter the applicants are currently undergoing trial for violating the Act and it is only upon their eviction that they can be evicted from the land.

In the case of *Route Toute BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement* HH 128-09 PATEL J dealt with a similar issue. In that case the applicants who had been registered owners and leaseholders of a farm claimed the right to continue to own or occupy the farm for commercial benefit. They claimed protection against compulsory acquisition on the basis of two bilateral treaties signed between the governments of Zimbabwe and the Netherlands. After the first respondent had lodged an application for confirmation of notice to acquire the farm the applicants were thereafter served with eviction notices. The parties subsequently entered into a settlement not to enforce the eviction notice.

Meanwhile, the third respondent entered the farm on the strength of an offer letter and the eviction notice. A provisional order was granted following the filing of an urgent application by the applicants. On the return day PATEL J dealt with a number of issues one of which was whether the applicants were entitled to remain on the land after they had been served with a notice of eviction. At p 7 of the cyclostyled judgment this is what he had to say:-

“As is apparent, section 3 of the Act is clearly designed to address the lacuna in the law that I have adverted to earlier. It specifically provides for the prosecution and conviction of any person who continues to hold, use or occupy Gazetted land after the stipulated period and for the eviction of such person upon conviction. What this means in the instant case is that the applicants are at large to remain in occupation of the farm and cannot be evicted therefrom except by due process, viz by order of court after prosecution and conviction in terms of the Act.”

I am mindful that in the case of *Top Crop (1976) (Pvt) Ltd and Malcolm William Clerk v Minister of Lands and Land Reform and Resettlement and Yvone Samukeliso Gumede* HH 74-09 BHUNU J in dealing with a similar matter of spoliation came to a different decision and dismissed an application for a spoliation order where from the facts of the case, the second respondent had moved onto land occupied by applicants on the strength of an offer letter. However, if it is accepted that one cannot take the law into their own hands in order to enforce a right, the courts still have to apply the law on spoliation notwithstanding the provisions of the Gazetted Land (Consequential Provisions) Act that prohibit the occupation of Gazetted land without lawful authority. It would be difficult to divorce due process from the requirements that an illegal occupier of Gazetted land has first to be prosecuted before being ordered to vacate the land by a competent court.

On the issue of the interdict sought the authorities are well established that an applicant must establish the following-

- (a) A *prima facie* right, even if it is open to doubt
- (b) An infringement of such right or a well grounded apprehension of such infringement
- (c) A well grounded apprehension of irreparable harm
- (d) The absence of any other satisfactory remedy
- (e) That the balance of convenience favours the granting of the interdict.

In this respect see *Knox D’Arcy Ltd & Others v Jamieson & Others* 1995(2) SA 579, *Eriksen Motors (Welkom) Ltd v Protea Motors & Another* 1973 (3) SA 685 and *Mudzengi & Others v Hungwe & Another* 2001 (2) ZLR 179 (HC).

Mr *Drury's* submission was that applicants have contracts with some resettled farmers and need to access the crops. In addition he argued that there is no statute that prohibits contract farming. I did not hear him specifically state what rights the applicants are seeking to protect. In view of the provisions of section 3 of the Gazetted Land (Consequential Provisions) Act that prohibit the occupation of Gazetted land without lawful authority it would be difficult for applicants to justify what rights they can claim in respect of the land. By now they ought to be off the land in question, save for waiting for due process of the law to take its course.

I do not think that the Airfield Investment case is distinguishable from the present matter. Although the facts are slightly different from the instant case, it is the principles of law enunciated therein that are of importance. In that case, after the publication of a preliminary notice to acquire land previously owned by appellant, the appellant objected to the intended acquisition. He then applied for an interdict to prevent the second respondent from further proceeding with the acquisition in terms of the Land Acquisition Act [*Chapter 20:10*]. Having cited a case dealing with requirements for an interdict MALABA AJ (as he then was) had this to say at p 9:-

“The threshold the appellant had to cross was the production of evidence which established the existence in it of prima facie rights of ownership in the land at the time the application for interim relief was made. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes an application for interim relief.

In *Stauffer Chemicals v Monsanto Company* 1988 (1) SA 805 at 809 F-G HARMS J said:

“.....the basis of an interdict is the threat actual or implied on the part of a defendant that he is about to do an act which is violation of the plaintiff's right and that actual infringement is merely evidence upon which the court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasions of rights. It is for the protection of an existing right. See *Meyer v Meyer* 1948 (1) SA 484 (T).”

The appellant was not in a position to show the existence of prima facie rights of ownership in the land which the first respondent was about to infringe because at the time it applied for the interim relief all the rights of ownership it had in the land had been taken by means of the order of acquisition and vested in the acquiring authority.....”

One other aspect deserves to be commented on. In their draft order applicants have sought the assistance of the Police in the enforcement of the draft order. They did not cite the relevant Police Officers or Police Station and it would be inappropriate to grant that order.

Accordingly, the application is granted in terms of the draft order as amended.

*Gollop & Blank*, applicants' legal practitioners

*Civil Division of the Attorney-General's Office*, first respondent's legal practitioners

*Antonio & Mlotshwa*, second respondent's legal practitioners